COMMISSION DECISION

of 26 July 1976

relating to a proceeding under Article 85 of the EEC Treaty

(IV/28.980 — Pabst & Richarz/BNIA)

(Only the French text is authentic)

(76/684/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 [1], and in particular Articles 1 and 3 thereof,

Having regard to the application pursuant to Article 3 (2) (b) of Regulation No 17 made on 9 December 1974 by Pabst & Richarz KG, Elsfleth, Germany, concerning the prohibition on bulk deliveries of certain qualities of Armagnac imposed by the Bureau national interprofessionnel de l'armagnac (BNIA), Eauze, France.

Having heard the parties in accordance with Article 19 (1) of Regulation No 17, and with Commission Regulation No 99/63/EEC of 28 July 1963 [2],

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions delivered pursuant to Article 10 of Regulation No 17 on 30 June 1976,

Whereas :

I

The facts may be summarized as follows :

1. Armagnac is the grape brandy manufactured in the region of Armagnac, France, as defined by the decree of the French Government of 25 May 1907. Brandies produced there are entitled to the registered designation 'Armagnac'.

   There are three stages in the production of Armagnac : vinification and distillation, maturing in a particular type of oak cask, and blending and reduction to an alcoholic strength fit for consumption. Armagnac is either bottled by the producer, cooperative or distiller and marketed under their label or else sold in bulk. When sold in bulk, it is bottled by the purchaser and resold under his label. Armagnac is graded by age in years from 0 to 5. Armagnac of grades 1 to 3 is sold as three star, grade 4 is sold as VO and grade 5 as VSOP ; Armagnac described as 'Napoleon' must be at least five years old.

2. The total volume of Armagnac delivered in a given year varies between 35 000 and 45 000 hectolitres of pure alcohol. In recent years, some 40 % of the total has been sold in France and the remaining 60 % exported. More than two-thirds of all exports are made to Germany ; in 1972/73 the quantity exported to this country was over 50 % more than for 1971/72.

   Bottled and bulk sales account for roughly half each of the sales in France. In contrast some three-quarters of export are made in bulk.

3. Armagnac producers and cooperatives and wholesalers, distillers and brokers are represented by the BNIA, which was established in 1951. Decree 62/20 of 8 January 1962 [3] recognized BNIA as a legal person with the following functions :

   — to conduct research into the production and marketing of Armagnac brandies, to be available for consultation by public authorities on all questions relating thereto, and to submit to those authorities proposals concerning the organization of the market,

   — to ensure that local customs be fairly, consistently and strictly applied in the manufacture and sale of Armagnac, to regulate the quality of brandies produced or offered for sale by wine growers and dealers in the area officially defined as Armagnac and, having made such regulation, to refuse entitlement to the registered designation 'Armagnac' to brandies not conforming to the rules in the decree of 6 August 1936 (as amended) laying down conditions governing the production of these brandies,

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.
[3] JO de la RF, 12. 1. 1962, p. 393.

— to provide harvesters, cooperatives and dealers with such technical and practical assistance as they may require in order to improve the quality of Armagnac and to safeguard its reputation,

— to centralize statistics and such economic, technical and practical information as it may need for its own purposes.

Decree 62/20 further provides that BNIA shall consist of a chairman, 12 delegates representing producers and cooperatives and 12 delegates representing wholesalers, distillers and brokers. The delegates are proposed by the trade associations and unions and appointed by the Minister of Agriculture. The chairman is appointed by the Minister of Agriculture after consultation with the delegates and may not be a member of the trade.

A standing committee consisting of the chairman, the two vice-chairmen and two other members (a producer and a dealer) is responsible for routine matters. All other matters are dealt with by the chairman and 24 delegates in general meeting.

No decision can be taken unless voted by an absolute majority of those present at the general meeting, in the presence of a government representative who either immediately endorses the decisions or refers them to the minister. BNIA notifies its decisions by circular to all producers and cooperatives, wholesalers and distillers, and these decisions are in practice observed. For bulk Armagnac sales, producers' and dealers' associations have agreed on each sale of Armagnac of grades 0 to 5 to submit the invoice to the BNIA and to authorize it to verify that each transaction actually conforms to the particulars given on the invoice and to carry out an inspection of quality on any Armagnac sold in bulk (see the agreement on market organization dated 16 October 1972, approved by the Minister of Agriculture on 12 February 1973 [1]).

For bulk exports of Armagnac, a decree of 25 August 1952 [2] confers upon the BNIA the sole right to issue certificates of age.

4. In practice, an importer of bulk Armagnac is obliged to supply the customs authorities regulating the bottling operations in the country of destination with an invoice countersigned by BNIA in accordance with the arrangements referred to above or with the customs permit. The latter, of a yellow colour, is valid as a certificate of the registered designation 'Armagnac' and is issued by the French indirect taxation authorities. It specifies the quantity and alcoholic strength of the Armagnac supplied, and records the number of a sales coupon prepared by the BNIA after examination of the documents supplied by the French exporter showing that the transaction has been 'examined for conformity' by the BNIA.

In 1973/74, the BNIA issued certificates of age for exports only in those rare cases where the purchaser expressly asked for the same. On occasions, however, the seller would himself enter the age of the Armagnac on the customs permit without any verification or certification either by BNIA or by the tax authorities. In some cases, however, this has been interpreted by the buyer as a certificate of age, and has facilitated the resale of the Armagnac under a particular denomination, such as 'Napoleon' in the case of Armagnac with an age grade 5.

The BNIA further prepares a dispatch note for every movement of bulk Armagnac other than movements within an undertaking. By this means, at any moment the BNIA is fully informed of the stocks of Armagnac of the various age grades held by producers and wholesalers.

5. On 28 May 1974 a general meeting of BNIA was convened 'to consider the situation as to age grades of brandies and probable developments in the light of the quantities of wine distilled in the past'. In the presence of the government representative the general meeting, as reported in circular 8/74 dated 29 May 1974, decided that from 1 June 1974 until further notice no dispatch of bulk armagnac with an age grade 4 or higher would be authorized. This did not apply :

— to transfers within a single firm,

— to the bulk delivery of quantities of less than 10 hectolitres,

— to deliveries under contracts entered into before 28 May 1974.

Circular 8/74 invited undertakings to apply without delay to the BNIA should the application of this decision cause them particular difficulties.

(1) JO de la RF, 1. 3. 1973.
(2) JO de la RF, 27. 8. 1952,.

Like all other BNIA circulars, this circular was addressed to all Armagnac producers, distillers and dealers, who, according to the complainant and the BNIA, all complied with its provisions.

From 1 June 1974 French exporters have no longer been able to deliver bulk Armagnac with an age of grade 4 or 5 under new contracts with producers, particularly in Germany, whereas it remained possible, and indeed became more frequent, to enter into contracts for the supply and export of bottled Armagnac of the same age grades.

For arrangements made before 28 May 1974 the BNIA exercised its powers to control qualities and decided that it would issue its export authorization only after samples had been submitted for tasting by an *ad hoc* committee and on production of an analysis by an official laboratory (see letter dated 17 June 1974 from the BNIA to Ducouret & Cie, a French firm exporting to Germany). It was in accordance with these conditions that during the months following relatively large quantities of Armagnac of age grade 5 were exported under existing agreements.

Circular 16/74 dated 9 December 1974 recorded the BNIA's decision generally to extend its inspection of quality to all movements of Armagnac in bulk.

The exception for supplies of less than 10 hl in practice concerned exports to Belgium, where consignments tend to be of such quantities. It did not extend to exports to Germany, where major importers tend to buy quantities of 25 hl or more.

6. On 9 December 1974 Pabst & Richarz KG, one of the largest German importers of all grades of Armagnac (particularly in bulk), made an application to the EC Commission requesting a finding that the prohibition on deliveries imposed by circular 8/74 was unlawful and ordering its termination.

After the Commission had twice written to the BNIA stressing the likelihood of an infringement of Article 85 of the EEC Treaty, the BNIA replied by letter dated 13 February 1975 that, notwithstanding the fact that the BNIA could not be considered to be an association of undertakings for the purposes of Article 85 and that the measure impugned was essential to the exercise of its function of controlling quality, it had that day issued circular 5/75 revoking the prohibition on deliveries.

The complainant asked that a finding that the BNIA had infringed Article 85 be issued nevertheless — on the grounds that the BNIA, having expressed its reservations as to the Commission's jurisdiction, might at any time introduce similar measures and thus jeopardize the complainant's regular supplies of Armagnac.

The BNIA had asserted, in particular, that the measure had been adopted in the presence and with the assent of a government representative in accordance with the usual procedure laid down in its statutes. The BNIA could therefore not be held liable since the measure could not be described as a private commercial decision ; in other words, it was not therefore a decision of an association of undertakings within the meaning of Article 85 (1).

The BNIA further alleged that the purpose of its decision was to restore fair competition through the regulation of quality as intended by decree 62/20. In October 1973 the German customs authorities reported their suspicions that certain importers in southern Germany had imported Armagnac bearing a false indication of age and had then sold the same as Napoleon Armagnac at abnormally low prices. Other suspected cases had been reported in May 1974.

The BNIA stated that the general meeting of 28 May 1974 had these cases in mind when deciding to suspend deliveries of age grades 4 and 5, that since circular 16/74 dated 9 December 1974 had achieved its purpose of regulating qualities, the measure impugned had been revoked, and that the measure in any event had had no effect for the following reasons. Circular 8/74 had provided for major exceptions, namely deliveries of less than 10 hl, deliveries under existing agreements and the possibility of special cases being recognized and treated accordingly ; secondly, the complainant had not approached the BNIA on any of these counts. Furthermore, the complainant's interests could not have been affected, since it had bought only grade 1 since the prohibition was revoked. However, the BNIA did concede that large quantities of age grade 5, in excess of 30 000 hl on 30 June 1975, were available.

The complainant's rejoinder was that he did approach BNIA member with a view to concluding new agreements but was told that there was no likelihood at all of such agreements being made. This is borne out by the fact that no exceptions were ever granted by the BNIA.

The prohibition imposed by all Armagnac producers and dealers reduced supply artificially and raised prices so appreciably that the purchase of age grade 5 was no longer a profitable venture for the complainant.

II

Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings and decisions by associations of undertaking which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

These provisions are applicable in the present case for the following reasons :

1. The prohibition on deliveries of bulk Armagnac of age grades 4 and 5 imposed by the BNIA circular 8/74 dated 29 May 1974 is the result of a decision by an association of undertakings. The Armagnac producers, cooperatives, distillers and dealers who are represented through their trade associations in the BNIA are undertakings for the purposes of Article 85 (1). The fact that the BNIA is entrusted with certain functions by decree 62/20 to control quality does not mean that it cannot be considered to be an association of undertakings for the purposes of Article 85 (1). The measure impugned exceeds the scope of measures necessary for the performance of functions assigned to the BNIA by the decree. It concerns the commercial sales policy of the undertakings BNIA represents Armagnac producers, cooperatives, distillers and dealers. This policy is not provided for in the decree. It originated with a motion put to the general meeting of 28 May 1974 by delegates attending that meeting ; the motion was carried by a majority vote and the decision was addressed and notified to all producers, cooperatives, distillers and dealers in Armagnac. These undertakings had agreed to use the services of the BNIA in the performance of their bulk sales agreements and to allow the BNIA to make inspections. Approval by the BNIA was essential for any bulk sale, particularly for export. The circular therefore bound those to whom it was addressed, such persons being no longer able to enter into any business transaction without complying with the rules which it prescribed.

The decision was not imposed by the administrative authorities. Nor was it based on any other intervention by the administrative authorities. The fact that the chairman of the BNIA and its 24 delegates are appointed by the Minister of Agriculture and that a government representative attends its meetings and concurred in the decision in question in no way rebuts the conclusion that this decision was a private commercial decision taken by the BNIA on behalf of the undertakings which it represents.

2. The object of circular 8/74 was to restrict competition within the common market and it has had this effect.

The fact from 1 June 1974 producers, cooperatives, distillers and dealers were no longer able to enter freely into new contracts for the supply in bulk of Armagnac of age grades 4 and 5 in quantities exceeding 10 hl was the direct result of the decsion in question. The statement that individual cases would be considered does not deprive the circular of its restrictive nature, for it implied that firms would have to consult the BNIA before entering into new agreements. In this way the BNIA was in a position to ensure a better quality control and to promote what it considered to be the common interests of all those whom it represented, thus restricting competition on the market.

Furthermore, the circular did indeed have an effect. The complainant and similar firms were unable to enter into new contracts to secure regular supplies, although it is clear from BNIA's own statistics that substantial quantities of grade 5 Armagnac were available. Even if the complainant did not formally seek an exemption on the terms the circular announced — without specifying the conditions thereof — this does not detract from the circular's restrictive effect because, and this is not disputed, there was in fact little likelihood of obtaining an exemption. Indeed it is a fact that no exemptions were granted for deliveries to Germany. Only those quantities which had already been contracted for could be supplied. Finally, the fact that, even after the prohibition was revoked, the complainant bought only grade 1 Armagnac is explained on the ground that he was obliged to change his arrangements for supply in the light of the new market situation. This does not reduce the restrictive effect which the measure in question had while it was in force.

BNIA's assertion that the measure in question was justified by the aim of improving the regulation of quality and of ensuring that Armagnac was no longer supplied under false designations cannot be accepted. It is clear that any fraudulent dealings in respect of the quality of a product can be adequately dealt with by application to administrative authorities or through the courts, and proceed-

ings of this nature have in fact been instituted. The measure in question went so far beyond what was necessary for the attainment of these two objectives that its deleterious effects on competition and trade between Member States cannot be considered to have been unforeseeable or involuntary.

Firstly, it did not apply to old contracts or to deliveries of less than 10 hl. By virtues of these exceptions, large quantities of grade 5 Armagnac were supplied, the specified quality apparently being correct since the BNIA required the submission of samples and the production of analyses. The BNIA was thereby achieving the control of quality even in respect of those deliveries to which the measure in question did not apply. It is therefore difficult to see why the conclusion of new agreements for the supply of grade 4 and 5 Armagnac was prohibited.

Secondly, the formalities concerning the production of a dispatch note were rendered generally more stringent by the BNIA circular 16/74 dated 9 December 1974. This confirms the impression that the obligation to suspend deliveries was far in excess of what was required for the purpose of adequately controlling quality.

Consequently, it was not necessary to take the measure impugned in order to improve quality control and to prevent false designations of quality. The aim of this measure, for purely commercial reasons was artificially to reduce the supply on the market. Such a reduction inevitably has the effect of distorting competition.

3. The prohibition on deliveries particularly affected exports to other Member States of bulk Armagnac of grades 4 and 5 with the consequent effect that, apart from a number of small deliveries of quantities of less than 10 hl, no new export agreements could be concluded. The prohibition on deliveries was therefore likely directly to affect trade between Member States.

4. The restrictive measure complained of has affected trade between Member States and competition to a considerable extent. The volume of stocks available at the time demonstrates that, in the absence of the measure, French exporters could have entered into new agreements for bulk deliveries of grade 5 Armagnac, exports of which to other Member States, particularly Germany, represent a major proportion of total sales.

5. Council Regulation No 26 [1], which provides for certain exceptions to the rules of competition with respect to agricultural products, is not applicable in this case since Armagnac, being an industrial product, is not among the agricultural products listed in Annex II to the Treaty.

[1] OJ No 30, 20. 4. 19762, p. 993/62.

III

Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement or decision which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The measure in question was not notified to the Commission. It is an agreement of the kind referred to in Article 4 (1) of Regulation No 17 and, until it has been notified, no decision in application of Article 85 (3) may be taken.

In any event, the Commission is unable to conclude that a prohibition on deliveries was indispensable to the attainment of the objectives of the control of quality by the BNIA.

IV

Under Article 90 (2), undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition contained in the Treaty in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

Even if the Commission accepted that the BNIA was an undertaking which, in respect of the control of quality, was entrusted by decree 62/20 with the operation of services of general economic interest, the prohibition in question would still constitute a quantitative restriction on trade between Member States which was not necessary to the performance of the BNIA's duties and effected the development of trade within the Community to an extent contrary to the interests of the Community. To ensure that measures of this kind are not introduced in the future, a Decision is adopted under Article 3 of Regulation No 17 that the offending measure infringed Article 85 (1),

HAS ADOPTED THIS DECISION:

Article 1

The prohibition on deliveries of bulk Armagnac of age grades 4 and 5 decided upon by the Bureau national interprofessionnel de l'armagnac by circular 8/74 dated 29 May 1974 and revoked, in response to representations by the Commission, on 8 February 1975 constituted an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

This Decision is addressed to the Bureau national interprofessionnel de l'armagnac, 13 place Félix Soulès, 32 800 Eauze, France.

Done at Brussels, 26 July 1976.

For the Commission

G. M. THOMSON

Member of the Commission